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NATIONAL LEGISLATION AND ITS ADEQUACY TO DEAL WITH THE VARIOUS FORMS OF ORGANIZED TRANSNATIONAL CRIME; APPROPRIATE GUIDELINES FOR LEGISLATIVE AND OTHER MEASURES TO BE TAKEN AT THE NATIONAL LEVEL

Background document

CONTENTS

	Paragraphs	Page
INTRODUCTION	1	2
I. A SYSTEMIC APPROACH TO THE PROBLEM OF ORGANIZED CRIME	2-5	2
II. PREVENTIVE STRATEGIES	6-14	3
A. Reducing the opportunities for criminal activities	7-9	3
B. Reducing the vulnerability of legitimate industry	10-14	4
III. CRIME CONTROL STRATEGIES	15-92	5
A. Substantive legislation	15-44	5
B. Procedural legislation	45-61	12
C. Special programmes	62-66	16
D. Law enforcement methods and organization	67-80	17
E. Problems of coordination	81-92	20
CONCLUSIONS. TOWARDS AN INTEGRATED APPROACH	93-100	22

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INTRODUCTION

1. In the present report, different strategies and policies adopted at the national level to combat organized crime are analysed and existing legislation against organized crime, both criminal and regulatory, substantive and procedural, is examined, together with law enforcement mechanisms and special programmes. Considering these strategies and policies in a systemic approach as goal-oriented,* the key elements that have proved successful are outlined and two types of goals analysed: prevention and control.** "Preventive goals" are the goals pursued in order to reduce the opportunities for accumulating profits through illicit activities, and to reduce the vulnerability of societies and Governments to infiltration by organized crime. "Control goals" are the goals designed to weaken, disrupt and dismantle criminal organizations by prosecuting and convicting their members and tracing and confiscating the assets accumulated through, or used in, illicit activities. Drawing on existing United Nations documents, reports and resolutions,[1] as well as on the experience of some selected countries, this analysis offers elements for understanding the conditions and limitations of the policies adopted so far, and also suggests ways to enhance national capabilities for responding more effectively to old and new threats posed by transnational organized crime. The legislation reviewed was selected on the basis of availability, regional representation and the existence of a variety of measures designed to deal with organized crime.

I. A SYSTEMIC APPROACH TO THE PROBLEM OF ORGANIZED CRIME

2. The goal of combating crime and the organizations that pursue wealth and power through criminal activities is often mentioned in official national and international documents, denoting an awareness of the problem and a will to take action. Shifting from the symbolic dimension to the reality of the situation in each country, many variables may influence the perception of the problem, the will to act and, hence, the effectiveness of the action that is taken. These variables include a number of objective elements, such as the level of resources available, the qualifications and professional skills of decision makers and of those who implement the action, in particular the criminal justice system personnel, including law enforcement agencies, as well as a number of subjective features or weaknesses, such as the level of corruption, or susceptibility to it, and other collusive relations between organized crime groups and some parts of the political, economic and bureaucratic system.

3. Owing to the inherent characteristics of organized crime, which is simultaneously engaged in providing illegal services and goods and in infiltrating the legitimate economy, the criminal justice system alone cannot successfully fight it. For these reasons, in the past few years, a range of "preventive" policies have been conceived and adopted, aimed, for example, at reducing the demand for illicit goods and deregulating or regulating some markets in order to reduce their vulnerability to infiltration by organized crime groups. These preventive policies, as opposed to crime control policies, relate to various sectors of the social and economic systems. The increased use of such policies (for example, the regulation of non-bank financial institutions as an anti-money-laundering policy), in

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*The main components of this approach can be found in E. U. Savona, "Strafrechtssystem und organisiertes Verbrechen", in Soziologisches Jahrbuch, vol. 3, 1987.

**For the theoretical framework of preventive and crime control policies see, E. U. Savona, "The organized crime/drug connection: national and international perspectives", in H. Traver and M. Gaylord, eds., Drugs, Laws and the State (Hong Kong, Hong Kong University Press), p. 126-127.

response to the organized crime emergency, calls for their close integration with crime control policies and, consequently, with the criminal justice systems.

4. A systemic approach designed to identify the most effective strategies against organized crime focuses on two elements: goals and policies. The more these are rationally linked, the more likely it is that the prevention and control system will be effective. The word "rationally" is used judicially to mean that a given society or country should select its priorities from among the desired goals, with a readiness to accept trade-off effects, and that it should base its choice on the policies that are least costly and present the fewest political and legal constraints, bearing in mind the fact that organized crime is simultaneously a domestic and an international problem.

5. In terms of strategy, the main question is to identify the most effective policies for preventing and controlling organized crime. The distinction between prevention and control is based on whether the policies pursued are defensive or offensive. Although they may appear to be closely interlinked in terms of the effects they produce, the difference lies in the intended goals. On the one hand, with respect to prevention, there may be a policy to reduce the demand for illicit goods and services, thereby limiting the opportunities for organized crime and preventing it from expanding. Conversely, the deregulation of, for example, the construction industry, or the introduction of a different type of regulation, has tended to make it much less vulnerable, preventing criminal organizations from securing a dominant, often monopolistic, hold on the market and making it much more difficult for them to infiltrate the legitimate economy. On the other hand, crime control policies are intended to disrupt the structure of criminal organizations. The two policies, to be effective, should be integrated into a systemic approach. In fact, when crime control policies are adopted without considering the advantages of preventive measures, and when general deterrence receives overwhelming attention and is viewed as the only form of prevention, the criminal justice system becomes overburdened and, therefore, less effective.

II. PREVENTIVE STRATEGIES

6. When considering how to prevent or reduce the incidence and expansion of organized crime, the main assumptions are that: (a) organized crime is a derivative of a complex society - the more complex the organizational structure of a society becomes, the more the crime problem reflects this complexity, taking on varying and more sophisticated organizational patterns; (b) the criminal justice system is overloaded; some experts are questioning whether the economic costs of control policies have reached the point of diminishing utility - criminal law alone, and law enforcement in isolation, cannot succeed in dealing with the increasing complexity, flexibility and sophistication of large-scale organized crime operations; (c) as organized crime is oriented to providing illicit goods and services and to infiltrating legitimate activities through a variety of methods, including corruption and violence, preventive strategies need to be identified, which, while reducing the opportunities for crime, will also increase the threshold of vulnerability of the economic systems to infiltration. These strategies need to be integrated into - and not opposed to - crime control measures.[2]

A. Reducing the opportunities for criminal activities

7. Strategies for limiting the opportunities for criminal activities involve different policies; for example the demand for illicit goods and services may be reduced, or an attempt may be made to make the goods and services monopolized by criminals legally available. These policies should be integrated, as their goal tends to be the same. On the one hand, there is the aggregated demand, while on the other, there is the demand for illegal goods and services only.[3] Since the problem is highly complex, it should be treated as such, taking into account the trade-offs and side effects that might occur. This aspect of

preventive strategy calls for a deeper knowledge and a thorough evaluation of its various implications and of their effects in different regions of the world.

8. The strengthening of the values of morality and legality must occupy a prominent place in preventive measures against crime. These values are prerequisites for building a social and cultural consensus against organized crime. The operations of organized crime groups, and their continued existence in territories where they are established and traditionally located, require a social consensus that helps to lower the risk attached to law enforcement activities and, in the process, facilitates the recruitment of new members. Organized crime groups achieve a consensus by redistributing resources and, consequently, creating incentives to employment in economically and socially depressed areas, and also creating disincentives through corruption and fear of violence. Building and maintaining high moral standards in political and administrative structures through respect for the law is the first commitment for effective action against organized crime. A culture of morality and legality has strong messages to convey to those who violate the law and to those who allow them to do so. The values need to be implanted, nurtured with extreme care, and passed on to new generations. As organized crime represents the organized violation of these values, it is essential to devise and implement comprehensive strategies to restore legality wherever it has been eroded, and to create "incentives for morality" for those who are exposed or susceptible to corruption. Measures for the protection of the criminal justice system against violence and the fear of violence are geared towards restoring legality[4] and codes of conduct in different areas of government and administration are geared towards restoring morality.

9. Policies that place emphasis on civic education can go a long way towards countering organized crime by building a social consensus against it, disseminating information and increasing awareness of the cost of organized crime to society. Here, the mass media play an important central role. The educational impact of messages transmitted by the media may, however, prove contradictory, since the emphasis is often on the spectacular or the sensational. Fictional crime stories and non-fictional accounts of crime are attracting increasingly wider audiences. Crime, violence, and corruption capture public attention in all parts of the world: the issue of reconciling the rights of information and freedom of artistic expression with the civic and social responsibility of promoting values of morality and legality is a very difficult one. The interrelationship between the media and crime, and their role in crime prevention, are truly challenging questions, which take on even more importance as time goes by.[5] Research and documentation on the experience gained thus far and increasing attention on the part of educational institutions are essential conditions for gaining the support of the media in this area.

B. Reducing the vulnerability of legitimate industry

10. A second goal within the framework of preventive strategies is related to the need to reduce the level of vulnerability of legitimate industry to infiltration by organized crime groups. The assumption is that organized crime tends to infiltrate the legitimate economy for different purposes, such as: (a) laundering and investing the proceeds of crime; (b) acquiring respectability and social consensus for its members; and (c) controlling the territory where it operates in order to maximize economic and political advantages and minimize the risk of apprehension, arrest, and conviction (what is termed the "law enforcement risk"). Activities in the illegal markets and infiltration of legitimate business are not separate in the life and operations of an organized crime group. Opportunistic criminal organizations go where the money is, and "mono-task" organizations, such as those specializing in drug trafficking, become opportunistic when they have to invest the money produced by their criminal activities. For both, the infiltration of legitimate business is part and parcel of their activities. In order to reduce the vulnerability of industry, there must be more transparency in the economic system.

11. Successful policies involve a good chemistry of regulation and deregulation. For example, a number of countries have recently been strictly regulating the licensing of all economic activities, including banking and financial services, that could be infiltrated by organized crime. In particular, a request for banks to monitor transactions in an attempt to frustrate the money-launderers may help to identify money-laundering operations and trace criminal organizations. Furthermore, new regulations and codes of conduct for businesses and professionals can also help in the fight against money-laundering by keeping standards of transparency high and avoiding infiltration by organized crime.

12. Conversely, however, regulation through licensing may reduce competition and lead to some inefficiency in the system. Reduction of the vulnerability of legitimate industries has therefore to be balanced by forms of deregulation that increase competition among different enterprises. Some industries (for example building and construction) are particularly attractive to organized crime groups.[6] It has been a long-standing practice in many countries for organized crime groups to use violence and corruption to obtain some form of monopolistic control over the bidding procedure for public contracts, especially in the construction industry. In these cases, deregulation, which increases the level of competition, may be beneficial.[7] When promoting and facilitating competition among enterprises for public contracts, special attention should be paid to structuring the general framework of competition in such a way as to reduce the opportunities for and the risk of infiltration by organized crime groups. Such a policy also has the advantage of reducing the risk of corruption because of competitive prices. Corruption requires some form of monopolistic control in order to keep prices high and thus cover its costs.

13. As regulation and deregulation policies may have their trade-offs in terms of efficiency, they should be regularly monitored and adjusted. For example, regulation is effective when transparency is required in order to identify the actors in the market, while deregulation is effective in order to decrease the opportunities for criminal groups to establish monopolies. The optimal amount of regulation and deregulation must be based upon variables determined by the structure and the power of organized groups acting in given areas, as well as basic characteristics of the economy, including its size, strength, level of development and ability to be flexible and functional.

14. Preventive strategies and policies, although not sufficiently used in the past, have increasingly been explored in recent times as a means of action against organized crime. They are promising and cost-effective if carefully planned and implemented. As such, they represent the natural complement to traditional crime control policies.

III. CRIME CONTROL STRATEGIES

A. Substantive legislation

15. Substantive criminal law has adapted itself in different ways to the changes imposed by organized crime. The countries that have been exposed to the greatest threats from organized crime have been the first to react, by refining their legislation. The main changes relate to the criminalization of participation in the activities of criminal organizations and to the confiscation of assets acquired through, or used in, such criminal activities. In some countries, legislation allows the confiscation of crime proceeds through civil action against the proceeds themselves (in rem). This can be seen as a further expansion of the capability of the law in dealing with the changing trends of organized crime.

16. In many countries, the fact that an offence was committed as part of organized crime is frequently considered by criminal law to be an aggravating factor. In these cases, criminal codes define the

commission of a crime by an organized group as a qualifying feature. A distinction is made between criminal activities engaged in by organized criminal groups and participation in an organized criminal activity. The former relates to activities traditionally conducted by organized crime groups. In the latter, membership in an organized crime group is penalized. In general, however, many countries punish differently the criminal activity engaged in by organized crime, according to their particular perception of this problem. For example, in some countries, in addition to the traditional offences, other less typical offences are considered by legislation as organized crime activities, including crimes such as participation in "anti-revolutionary syndicates," or "loitering syndicates," and offences against "public order".

17. Although there are exceptions, there is an emerging consensus on organized crime activities in different countries' legislation. The following list drawn from the legislation of some countries with considerable cultural diversities can give an idea of the most recurrent offences considered by legislation as organized crime activities: in Germany, illicit narcotics trafficking, gang robbery, the receiving of stolen goods, trading in illicit firearms, extortion, management and procuring of prostitution, and illicit gambling; in Italy the distribution of illegal drugs, kidnapping for profit, extortion, fraud, loan-sharking and counterfeiting of public money or securities; Jamaica has a Dangerous Drugs Act, an Offences against the Person Act, a Larceny Act, a Forgery Act, a Firearms Act and a Corruption Prevention Act. Statutory law in England and Wales considers the following as criminal activities: various forms of fraud, false accounting, handling of stolen property, drug trafficking, forgery, living off the earnings of prostitution, and various forms of assault. Criminal activities according to the common law in England and Wales are: murder, manslaughter, kidnapping and false imprisonment. In the United States of America there is no general national law against murder, robbery, burglary or rape; instead there are 51 different sets of laws, in the 50 states and the District of Columbia that provide for such crimes. Federal law acts in cases of criminal activity affecting the country as a whole, proscribing a number of criminal activities commonly engaged in by organized crime, such as trafficking in illicit drugs, extortion by private or public persons, illegal gambling, and the interstate transportation or receipt of stolen property or property obtained by fraud.

18. Countries of the new Commonwealth of Independent States are now updating their criminal legislation against organized crime. A process of convergence through known and well established offences is developing in the republics of the former Soviet Union. The perception of organized crime as a serious problem is bringing the legislation of many of these countries into a process of modernization in which the old ideological offences traditionally associated with organized anti-revolutionary activities have been deleted. Banditry, possession of contraband, embezzlement of Government property, extortion, fraud, black marketeering, robbery, armed assault, premeditated murder, causing serious bodily harm, and drug-related crimes are the most frequent offences recognized by these countries. Their legislation, and also their criminal justice systems as a whole, are going through a deep process of change and modernization.[8]

19. A recent trend, which has substantially modified criminal legislation, is to consider "participation in an organized criminal association" as a crime. In many countries, this coincides with the crime of "conspiracy". Conspiracy is defined as the formation of a combination of two or more persons on a continuing basis for the purpose of committing an indefinite number of unlawful or criminal acts through the common use of all necessary means to carry out the concerted criminal plan. In order to be found guilty of criminal conspiracy, a defendant must be permanently aware of his membership in the conspiracy, and must always be ready to operate with the aim of implementing the pre-established plans of the conspiracy. Italian law has separate provisions prohibiting conspiracies to distribute illegal drugs. Because of certain characteristics peculiar to the Mafia culture, especially the duty of silence, known as omertà, conspiracy has always been difficult to prove in a trial. In view of these difficulties, Italy

enacted a law in 1982 introducing a new offence. This law makes it illegal to be a member of a Mafia-type association composed of three or more members. An association is defined as "Mafia-type" when its members strive to secure the management or at least the control of economic activities, grants, permits, public works, contracts, and public services to make illicit profits or to acquire other illegal benefits for themselves or others. This crime is separate and distinct from the crime of general criminal conspiracy or the crime of drug conspiracy.

20. Born out of emergency, this law has turned out to be a powerful tool against organized crime. The crime of "membership of an organized crime association" is based on the assumption that members of criminal organizations commit crimes. This assumption has made it possible to prosecute the top bosses of organized crime for this crime alone, on the basis of evidence provided by members of criminal organizations who have turned State's evidence. This crime has shown its potential in a long series of trials in which top Mafia leaders have been convicted and sentenced.

21. The Italian example of 1982 follows, albeit with many differences, the example set by the United States of America in the legislation of the 1970s. Although judicial interpretations of the United States Constitution did not allow the national legislature to prohibit mere membership in an organized crime group, the Racketeer Influenced and Corrupt Organizations statute, commonly known as RICO, makes it an offence for a person to participate in the affairs of an enterprise through a pattern of racketeering activity. The term "racketeering activity" is defined in the RICO statute with great detail, and encompasses virtually all serious criminal activity prohibited by either state or federal law, such as murder, robbery, drug dealing, fraud and other serious crimes listed in the statute. The Continuing Criminal Enterprise statute (CCE) is directed only against persons who are engaged in large-scale drug dealing, and requires, inter alia, that the defendant commit at least three violations of the drug laws while acting as a manager or organizer of five or more people. In addition to these statutes, the United States has a statute prohibiting general criminal conspiracies and a separate statute prohibiting drug-related conspiracies.

22. Other countries, which do not have the extensive organized crime groups with which Italy and the United States, for example, have long been familiar, have hesitated to follow the Italian and American examples, considering the category of "conspiracy crime" sufficient to deal with the emerging organizational typologies of organized crime. Law enforcement agencies, prosecutors and judges believe that including participation in a criminal organization as a specific crime has been a powerful tool in their hands for disrupting criminal organizations. The numerous indictments in the United States on the basis of the RICO legislation and the positive results of the implementation of article 416 bis of the Italian criminal legislation suggest that an extension of those categories to other national legislation may have definite advantages.

23. The success of efforts to combat the laundering of "black money" directly depends on the level of accessibility of law enforcement agencies to the activities of financial bodies. A problem here is that opening up the activities of financial bodies to outside scrutiny can affect their competitive position. The activities of organized crime may, however, undermine the entire financial market, thus affecting society as a whole. Furthermore, the money derived from organized crime often circulates through the same channels as legitimate funds. In view of this, it is vital for the banks to maintain records of the identity of their clients, and to cooperate with law enforcement agencies whenever there are suspicious deposits or other transactions. It may be necessary to strengthen mechanisms of control over banking operations and even to centralize information of this kind.

24. In recent years, many countries have introduced into their criminal laws the crime of drug-money-laundering, in accordance with the United Nations Convention against Illicit Traffic in Narcotic Drugs

and Psychotropic Substances of 1988 (E/CONF.82/15 and Corr.2). Because, however, drug trafficking is only one source of the proceeds of crime, there is a tendency in many Western European and North American countries, and in Australia, to expand the predicate offences from those related to drugs to virtually all serious crimes. In Central and South America and Asia, when money-laundering is criminalized as a separate offence its application is often limited to drug instrumentalities and proceeds. Eastern European countries are beginning to tackle these issues in the context of an overall re-examination of the law of property, banking regulations and criminal procedure. Few African countries have ratified the 1988 Convention and criminalized money-laundering.[9]

25. According to the conclusions of the International Conference on Preventing and Controlling Money-Laundering and the Use of Proceeds of Crime: a Global Approach, seven areas have been identified as implementation priorities for an effective anti-money-laundering global strategy. These areas are predicated on a number of assumptions about the presence of certain international and national enforcement mechanisms. Key among them is the concept that a net or web operates at three complementary levels - international, regional and national (which may be further divided into penal, cultural and administrative mechanisms at the national level). Political support, adequate resources, and high professionalism are essential conditions for effective action at all three levels. Governmental, multilateral, regional and international institutions must allocate adequate means and facilities to regulate or exercise successfully other types of control over highly sophisticated activities that may involve a large number of legitimate transactions, as, for example, in the case of wire-transfer technology.[10]

26. Corruption greatly facilitates the activities of organized criminal groups. In view of this, many countries have enacted special anti-corruption legislation. The fight against organized crime would be greatly assisted if all countries were to follow the anti-corruption recommendations adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in its resolution 7.[11]

27. Specific domestic criminal legislation dealing with the problem of corruption can be found in many countries. Some examples can help to highlight the categories used for criminalizing corruption. For example, in Germany, under the penal code, active or passive bribery of public officials, civil servants or employees, is a criminal offence. In addition, with respect to commercial transactions, German law makes it a criminal offence to bribe any employee in connection with that employee's official functions. Italian law has a wide variety of penal offences calculated to reduce the opportunities for, and the impact of, corruption. Italian law was recently modified to strengthen the provisions against corruption. It is a criminal offence for public officials to embezzle money or illegally enrich themselves. It is also a criminal offence for a public servant to abuse a position of power by soliciting or receiving a bribe in order to perform an act related to the duty of the office held by such official. The penal law also punishes a public servant who performs an act contrary to his official duties.

28. In Jamaica, the Corruption Prevention Act deals with corruption of public officials and covers the soliciting or receiving of bribes, the offering of such bribes, or acting as an intermediary to facilitate a bribe. There is no legislation covering bribery and corruption in private enterprises. Federal Mexican law establishes the following penal offences: wrongful exercise of public office, abuse of public authority, wrongful use of the powers of public office, extortion by a public official, intimidation by a public official, abusive exercise of a public official's functions, selling the influence of a public official, bribery of a public official, embezzlement of public funds, and unlawful enrichment.

29. The United Kingdom of Great Britain and Northern Ireland has a variety of criminal offences related to official corruption. Some of these are crimes created by common law, while others are governed by statutory law. In the United Kingdom, there are common law offences for misconduct in

public office, bribery or attempted bribery of a public officer, or accepting bribes when in public office either to act in a manner contrary to public duty or to show favour in the discharge of public functions. One of the earliest statutory offences in English law is the Sale of Offices Act of 1551, which prohibits the buying or selling of any public office concerned with the administration of justice. In 1809, these prohibitions were extended to all offices held under the Crown throughout the United Kingdom. Similarly, the Public Bodies Corrupt Practices Act of 1889 makes it an offence for any member, officer, or servant of a local governmental authority corruptly to solicit or receive any gift as an inducement or reward for performing any act associated with the office held by the official. In the private sphere, the Prevention of Corruption Act of 1916 prohibits a person who acts on behalf of another, for example, an employee, from accepting money to act to the detriment of the person for whom he is acting, for example, an employer.

30. United States law prohibits a public official of the federal or national Government from demanding, seeking or receiving a bribe. The same law prohibits anyone from giving, offering or promising a bribe to such public official. In addition, various laws limit the type of private business and legal relationships a former Government official may have with current Government officials after leaving office. Federal law also requires certain public officials to relinquish control of their financial investments to another person so that their actions in public office will not be influenced by even an unconscious desire to increase their own personal wealth. In addition certain individuals are required to file financial disclosure forms indicating all their financial interests. The Federal Government also has at its disposal many laws to battle corruption by local officials of the 50 states. For example, the RICO statute discussed in paragraph 21 above has been used to prosecute public officials who have used their office corruptly. Finally, all 50 states have statutes designed to fight corruption.

31. Preventive strategies against corruption have been adopted in a number of countries and specific mechanisms have been set up, such as the Independent Commission against Corruption in Hong Kong and in New South Wales, Australia. In the context of preventive strategies, codes of conduct have been elaborated and an increasing number of countries are implementing them.

32. Prosecution of corruption is difficult and the adjudication of the alleged offender even more so, especially when organized crime is involved, owing to the problems in obtaining evidence. Laws often create incentives for solidarity between corrupted and corruptor, both being punished equally. For these reasons, it is necessary to develop new sets of policies against corruption, from regulatory to criminal ones. Many regulations in areas sensitive to corruption need to be reshaped (preventive policies) by incorporating incentives for reporting corruption cases into the same legislation that punishes the corrupted officials and by creating (at a legislative or judicial level) a conflict of interest between the corruptor and the corrupted, in order to obtain evidence.

33. Corruption is part of the transnational dimension of organized crime and international corruption is growing as a related phenomenon. Many countries do not punish business executives who bribe foreign officials and, in some ways, they have legalized corruption practised outside the borders through a system of financial and tax advantages. The contradiction between domestic and international morality is thus a stark one. A special commission of the Organisation for Economic Co-operation and Development has drawn up recommendations dealing with international corruption, with a view to harmonizing the laws of different countries.[12] This is in line with the efforts of other institutions, such as the Council of Europe and the International Chamber of Commerce, which have recommended the adoption of international measures (treaties, conventions) as crucial instruments in the fight against corruption.[13] It is essential that all countries respond positively to these recommendations.

34. In addition to the traditional sanctions of imprisonment or fines that may be imposed upon conviction, consideration should be given to other sanctions designed to deter organized criminality. Some countries use judicially imposed limitations on the property, residence, association and daily activities of persons formally judged to be criminally dangerous, often taking past convictions into account. The granting of licences and public contracts may be conditional on the absence of criminal connections and proof of good reputation. Individuals and legal entities engaged in economic or financial activities involving great risk to the public, for example deposit-taking institutions or those dealing with toxic wastes, should be subject to adequately strict and enforced regulation to prevent wrongdoing, in particular since penal sanctions rarely provide proper compensation for victims.

35. Particular attention should be paid to the deterrence and punishment of misconduct by legal entities, such as multinational and other corporations. Individual executives may frequently be beyond national jurisdiction and personal responsibility may be difficult to establish. Criminal punishment of the entity itself, by fine or by forfeiture of property or legal rights, is used in some jurisdictions against corporate misconduct, and an increasing number of countries are including corporate crimes in their legislation. The establishment of criminal responsibility of a legal entity for corporate crimes is a powerful deterrent, intervening in the invisible or intangible good of the "reputation". The growth of economic crimes strictly connected with organized crime, such as frauds, calls for more attention to the activities of legitimate enterprises. These are the places where the infiltration of organized crime begins the process of polluting the legitimate economy and corporate sanctions can help to reduce the vulnerability of economic systems.

36. Crime committed for economic gain can be successfully countered by the forfeiture of such gains and of any other assets of the individuals and organizations involved. In some legal systems, great significance is attributed to the freezing, seizure, and confiscation of assets related to illegal activity. The need for more effective organized crime control makes it necessary to regard forfeiture as a strategic weapon, an economic method of discouraging organized crime activities and a means of eliminating the financial advantages of such antisocial activities.

37. The procedures for freezing, seizure, and confiscation need to be of broad scope and to permit the confiscation from the offender of a wide range of assets in order to eliminate all gain from the criminal activity. As a secondary benefit of such action, law enforcement agencies would be able to use confiscated assets or funds to further the activities of the agency. This can act as a powerful incentive. International agreements may also provide for the sharing of such assets.[14]

38. When dealing with organized crime, and on the basis of existing legislative provisions and practice, it may be appropriate to make any property constituting the proceeds of organized crime actions and any assets obtained with the help of these proceeds and any property used or intended to be used, in any manner or part, to commit or facilitate the commission of a crime by an organized group, including land, buildings and other private property subject to confiscation.

39. Consideration may also be given to allowing certain flexible evidentiary rules to be used in the procedures for confiscation of the assets of criminals involved in organized crime. For example, if it is proved that defendants had acquired assets during the time they were committing offences for which they had been convicted, and there is no other likely method by which they could have acquired the assets, then it may be reasonably inferred that the assets are the proceeds of crime. In the legislation related to confiscation, the liberty and property rights of individuals should be protected, in accordance with national constitutional principles and existing international instruments.

40. As may be seen from a recent analysis,[15] there is a marked convergence of country policies on asset forfeiture and confiscation of the proceeds of crime, which appear to be more widely accepted than the criminalization of a money-laundering offence per se. In the numerous countries where there are no specific money-laundering provisions, it is possible to find confiscation provisions deriving from more generic laws dealing with stolen property or the proceeds of a criminal act. Some examples drawn by the legislation of countries which have recently considered this issue can help in understanding recent trends. German law allows for both forfeiture and seizure of property under certain circumstances. A defendant may forfeit any financial advantage which he gained through the offence or as a result of his unlawful act. Forfeiture applies not only to tangible assets but also to accrued financial advantage. German law establishes various mechanisms to provide for the rights of third-party claimants to the property who are not involved in the activity. The concept of forfeiture allows property accrued in violation of law to be forfeited even if the defendant did not show the required intent to commit a criminal offence. If the defendant has violated a law for which forfeiture is a penalty, then the property acquired through the violation of that law is subject to forfeiture. In addition to the legal concept of forfeiture, German law provides for seizure of tangible assets which are acquired through the defendant's intentional commission of a criminal offence, or used by the defendant for the purpose of committing that offence, or in preparation for the commission of the offence, or intended by the defendant for use in intentionally committing a criminal offence. The principle of proportionality applies to both seizure and forfeiture, requiring that the seizure or forfeiture of the asset be in proportion to the extent of the harm caused as a result of the illegal act.

41. Italian law provides for two types of forfeiture. The first type is of a preventive nature; it allows a court to order the seizure of assets belonging to a person if that person's lifestyle is inconsistent with the person's apparent or declared income. In that event, the person is required to explain the nature and source of the asset. If the person can articulate and prove a lawful basis for his possession of the asset, then he is allowed to retain it. If, however, the person is unable to provide the authorities with an explanation as to the lawful acquisition of the asset, the court may order the asset forfeited. The second type of forfeiture or confiscation involves assets which have been used to commit a crime or are the products or profits of such crime. Confiscation is mandatory upon a defendant's conviction of a criminal offence related to his use or acquisition of the property in question.

42. In Jamaica, in addition to the forfeiture under the Exchange Control Act, the Dangerous Drugs Act provides for the confiscation of conveyances, for example boats, aeroplanes and motor vehicles, used in the commission of the offence. Particular attention is given to the forfeiture of assets acquired from the illicit trafficking of drugs and psychotropic substances. Mexican law permits the forfeiture of the instruments used to commit a criminal offence. The Mexican Constitution, however, prohibits confiscation, which is understood to be a non-judicial seizure of property. In the United Kingdom, confiscation of drug proceeds is allowed for the entire value of the drug proceeds, including property transferred to third parties as a gift or sold for significantly less than its full value. In addition, instrumentalities of drug trafficking crimes may be forfeited.

43. In the United States, the following laws allow the confiscation of assets: the RICO statute, the CCE statute, the anti-drug laws, and a wide variety of other federal criminal statutes. The drug law permits the forfeiture of the proceeds and instrumentalities of drug trafficking. If the Government proves that a defendant violated the drug laws and acquired property during the time he was committing the drug offence for which there is no other likely source of funds, then it is presumed that such property was acquired with drug-related money even though that fact cannot be specifically established. The defendant, however, is free to offer evidence showing that the property was obtained in a legal manner. In the former Soviet Union, confiscation of property was permitted only if specifically provided for by statute. In general, confiscation of property is allowed for all types of specified profit

oriented crime. The confiscation law exempts property needed by the defendant or his dependents, for example, a residence, foodstuffs, and money totalling the monthly salary of the criminal.

44. The main sanctions applied to cases of organized crime are imprisonment and confiscation of assets derived from crime. The latter has acquired growing importance as a necessary complement to anti-money-laundering policies, drawing on the experience of countries that have imposed it. Drawing on that same experience, other countries could be encouraged to introduce such sanctions into their legislation. Modifications in property laws may, however, be necessary, just as it is necessary to ensure the efficient functioning of legal enterprises that are objects of confiscation.

B. Procedural legislation

45. On the basis of a review conducted by the International Seminar on Organized Crime, held at Suzdal, Russian Federation, from 21 to 25 October 1991 (see Economic and Social Council resolution 1992/23, annex II), it would seem that most countries have procedural provisions empowering the courts, prosecutors, investigators and the police, as appropriate and in accordance with their respective competencies, to carry out investigations whenever there are indications of a crime. There may, however, be discretionary powers that allow the law enforcement authorities to decide whether or not to investigate or to initiate prosecution. Where this discretion exists, it is often used by investigators when working with informants from criminal circles. Its use requires a high degree of professional responsibility on the part of the investigators. Legal systems do recognize the possibility, in some cases, of granting minor offenders immunity from prosecution, in return for disclosing identities of leaders of organized criminal groups.

46. The criminal laws of many countries specify the elements that must be established to prove an offence. These may include: the commission of an offence; the defendant's guilt and motives for the crime; any aggravating or extenuating circumstances, including the defendant's record; and the nature and amount of damage inflicted by crime. The evidence is evaluated by the official performing the investigation, by the prosecutor, and finally by the court. In practice, there is no difference in the standard of evidence required in respect of crimes committed by organized crime groups compared with other crimes. Deciding on the verdict remains a task for the appropriate authority exercising judicial powers over serious offences committed by organized crime. In doing so, the principle of the presumption of innocence must be followed.

47. The experience of many countries suggests that there are advantages to be gained by using information obtained with the help of electronic surveillance, undercover agents, controlled delivery, the testimony of accomplices and similar methods of preliminary investigation for the collection of evidence. The acceptability of such methods is limited by the strict observance of legal requirements and criminal procedural principles. The use of the testimony of accomplices can be extremely helpful in prosecutions involving organized crime. Careful assessment and use of such testimony can enable law enforcement authorities to penetrate the layers of secrecy that are characteristic of criminal organizations and that would otherwise protect them from prosecution. Some countries have also found it advantageous to enact legislation obliging witnesses to testify truthfully and providing for sanctions if they refuse to do so.

48. The restriction of the liberty of the defendant prior to conviction is frequently allowed by the law when there are specified grounds. The main form of such restriction is pre-trial incarceration. This can be ordered if it is appropriate, in view of the seriousness of the case and the possible sentence upon conviction and for other reasons, for example because the defendant has tried to escape or because he or she may seek to evade justice or conceal evidence, or that he or she may commit further offences or

pose a threat to witnesses, or otherwise be a danger to the community. If there is a bail system, the defendant who has been accused of an offence could be released upon the payment of a certain sum of money, unless the judicial authorities believe that pre-trial incarceration is necessary. The question whether a criminal may be released on bail should normally be a matter for a judicial or other appropriate body but the financial resources of those engaged in organized crime are often such as to make release inappropriate, since forfeiting bail may be considered as an acceptable cost of their business. The appropriateness of granting conditional release and other benefits of law in cases of organized criminality must be evaluated, taking into account the criminal record of the accused and the severity of the accusation.

49. Two questions appear to be of particular relevance in procedural legislation: (a) mandatory or discretionary principles of prosecution; and (b) issues of proof. Some examples drawn from existing legislation can lead to a better understanding of the way in which these questions are considered by domestic laws. In Brazil, police and investigative authorities are allowed some discretion with regard to whether to arrest or proceed with an investigation of an offence known to them. No discretion is granted to prosecuting authorities if there is sufficient evidence to bring charges against a defendant.

50. Under German law, both the police and the Department of Public Prosecutions have the duty to institute criminal proceedings if there is sufficient evidence to show that a person is guilty of a criminal offence. Thus, Germany follows the principle of mandatory prosecution. Italy also follows the same principle. The police must report to the prosecutor, within 48 hours, any crime that has come to their attention. Similarly, the prosecutor is required to initiate criminal proceedings if the evidence so warrants. However, under certain circumstances, the prosecution may request from the appropriate judicial authority a reduction in the charge or reduced punishment, in exchange for the defendant's cooperation in a criminal investigation.

51. In Jamaica, some discretion is allowed to enable the police to overlook minor offenders in order to further their investigations of major offenders in organized crime. The final authority for prosecution is the Director of Public Prosecution, who is a constitutionally independent officer, not subject to the directions of anyone. The Director may determine at any time to commence a prosecution, take it over or discontinue it. In the United Kingdom, the decision whether to investigate a report of criminal activity rests entirely within the discretion of the chief officer of the force responsible for conducting the investigation. Crown Prosecutors have discretion at all the various stages of prosecution, including the power to terminate proceedings or offer no evidence. This discretion is exercised in light of the Code for Crown Prosecutors, which details the manner in which crown prosecutors perform their duties. In the United States, the investigative agencies have discretion whether to investigate or report a criminal offence to a prosecutor or judge. This discretion is frequently used by investigators to develop sources of information regarding criminal activity. A prosecutor has discretion not to bring charges against a potential criminal defendant, and to enter into plea agreements asking the court to impose a reduced sentence based on the defendant's cooperation. This discretionary authority is frequently used, and is an important tool for obtaining evidence concerning other criminal activity; it is, however, to be exercised in accordance with appropriate guidelines.

52. Related to the issue of proof, the first problem is the burden of proof. There is a general convergence, and it is part of legal tradition, that the burden of proof lies upon the State. The prosecutor should be able to prove guilt backed by strong evidence (beyond reasonable doubt in the United Kingdom and the United States). The presumption of innocence until conviction is universally recognized as an essential condition of legality.

53. With regard to evidence-gathering, electronic surveillance has been one of the most powerful technologies for collecting evidence. The difficult balance between the right to privacy and the need for law enforcement to trace alleged criminals characterizes the definition and the implementation of this powerful technology. Domestic laws authorizing or denying such use are influenced by this debate. Systems of balance have been found in many countries, which have used this technology successfully against organized crime groups. For example, Brazilian law allows electronic surveillance after the requesting officials receive judicial authorization. In Germany, electronic surveillance, along with the other forms of investigation, are within the competence of the investigatory authorities and are still considered permissible. Legislation specifically addressed to electronic surveillance and other forms of sophisticated criminal investigations provides that evidence produced through such methods is admissible with some limitations. Under current legislation, the admissibility of these methods is limited by a strict interpretation of the constitutional law relating to proportionality with respect to criminal investigations, and also by other principles of constitutional law, together with basic principles of law and justice. Investigative methods that affect the domain of individual personality to any considerable extent, or methods that are employed in secrecy, are only admissible in connection with serious offences. In addition, the Government must establish that other investigative procedures less injurious to the persons concerned are considered.

54. In Italy, in cases concerning serious offences, telephone wire-tapping and interception of telephone communications are allowed. The order for such surveillance is issued by a preliminary investigations judge at the request of the prosecutor. In urgent cases, the prosecutor can order the interception by issuing a decree stating all the reasons for such a measure. The prosecutor must, however, submit within 24 hours a written application to the preliminary investigations judge for such wire-tap authorization. The judge must confirm or deny the request within 48 hours. In addition, the anti-Mafia law provides for preventive telephone tapping. Wire-tapping must be authorized by the public prosecutor and carried out in compliance with the relevant statutory provisions governing such surveillance. Information obtained under this law may be used to develop evidence, but may not itself be offered as proof at trial. In Jamaica, the law does not allow the use of electronic surveillance for collecting evidence but the possibility of enacting such legislation is being considered. The United Kingdom allows electronic surveillance evidence to be admitted under the Police and Criminal Evidence Act of 1984. The decision to use electronic means in an investigation is contained in non-statutory guidelines, which require investigators to obtain approval from appropriate authorities before beginning the surveillance.

55. In the United States, electronic surveillance is allowed if an order is obtained from a judge. The requirements for obtaining such an order are governed by statute. If authorized by a judge, a suspect's conversations with other individuals may be monitored without the consent or knowledge of any of the parties to the conversation. It is a serious crime to conduct electronic surveillance without a court order. In addition, electronic surveillance conducted in an improper manner will not be admitted in evidence under the exclusionary rule of evidence, to deter misconduct by law enforcement officials. No court authorization is needed, however, for an undercover agent or consenting witness voluntarily to record a meeting with the subject of an investigation.

56. The effectiveness of such technology is limited by rapid changes in communication technology. Criminals are adapting their methods to this technology, frequently using encrypted phones and faxes, thus making any kind of interception by law enforcement agencies impossible. The development of crypto-technology is placing serious strains on electronic surveillance. It is a moot point whether only one standardized type of crypto-technology should be available, giving law enforcement agencies the capacity to intercept it, or whether, owing to market pressures, different crypto-technologies can be used, making interception more difficult.

57. Differences are also evident in the use of undercover agents and controlled delivery, new powerful instruments that are being used successfully against organized crime. Some countries do not allow the use of undercover agents, others place some restrictions on their use in terms of the crime involved (for example only for drug trafficking), while others prohibit incitement to commit a crime. In many countries the court wants to see clearly that no entrapment was initiated by the police. Some countries allow the controlled delivery and sale of drugs to an undercover officer, and in some limited cases allow an undercover officer to deliver drugs to another person.

58. Positions differ with regard to testimony by accomplices. Some countries permit the testimony of such witnesses. Others specify that testimony of co-defendants charged with the same crime, or the testimony of defendants in a related case, cannot be admitted unless they have been irrevocably cleared of charges. In other countries, the court weighs the testimony of an accomplice witness with greater caution and care than that of an ordinary witness, because the accomplice could be motivated to falsify his or her testimony.

59. With reference to evidence gained as a result of confidential informants, some countries prohibit the use of anonymous testimony in judicial proceedings. Confidential informants can, however, be used by the police in conducting investigations into criminal activity. Other countries provide that anonymous reports cannot be used at trial. Documents containing unsigned statements can neither be admitted as evidence nor otherwise used. Information supplied by confidential sources can nevertheless be used by the police for investigative purposes and may provide the probable cause needed to justify a physical search or electronic surveillance, the results of which may be admitted in court.

60. Within certain limits, countries are veering towards admitting enforced testimony. In Germany, if a witness declines without lawful reason to make a statement, the court will declare him to be in contempt of court and impose a disciplinary fine. In Italy, the witness is required to appear before the judge and comply with the judge's orders relating to proceedings, as well as to answer all questions by telling the truth. If the witness has been regularly summoned but fails to appear without reasonable excuse or justification, the judge can order the witness to be forcibly escorted into court. In the United Kingdom, witnesses can be compelled to attend court, but they generally cannot be obliged to make a statement in advance. There is a requirement for persons with knowledge of terrorism offences to disclose that information to the police. In the United States, the Fifth Amendment to the Constitution provides that no person shall be compelled to be a witness against himself. However, a federal prosecutor, with the written finding of a senior official in the Justice Department that it is in the interest of justice to secure the testimony of a reluctant witness, can obtain a compulsion order from a federal judge, who orders the witness to testify. This order must also provide that nothing the person says while testifying can be used against him or her as evidence or to develop evidence against the witness. If a person still refuses to testify, he can be incarcerated for refusal to comply with the court's order until he testifies, for up to a maximum of 36 months, or prosecuted for any false declaration.

61. The presence of organized crime has led to important changes in the criminal law procedure of many countries, particularly those, such as the United Kingdom, that are sensitive to the political version of such crime, namely terrorist activities. There are factors for and against two models of mandatory and discretionary criminal action and it is difficult to make a comparative evaluation without considering the political and social framework in which the criminal justice system operates. Discretionary systems are more efficient but can produce more inequalities. Mandatory systems theoretically provide a better guarantee of equal rights and reduce the possibility of discrepancies, but they may be less efficient. This inefficiency can, in the end, lead to a practical discretionality, which may be worse than discretion established as a principle by law and properly regulated.

C. Special programmes

62. Provisions that ensure the protection of witnesses are of great importance in the fight against organized crime.[16] Some national systems of criminal justice have paid close attention to this question, and have enacted legislation providing for the security of witnesses. In particular, attention has been focused on measures to protect witnesses by allowing for them to move to a new place and change their identities and providing physical protection if a threat has been posed by a defendant or the defendant's associates. This can necessitate making arrangements to provide the witnesses with documents enabling them (and members of their family) to establish a new identity, providing temporary housing, arranging for the transportation of household furniture and other personal belongings to a new location, making subsistence payments, helping the witnesses to obtain employment, and providing other necessary services to help the witnesses to lead a full and normal life. In considering the type of protection to be provided, the financial circumstances of a country must be taken into account. In addition, provision needs to be made for the safe custody of incarcerated witnesses, including separate accommodation. Legislation may also be necessary to deal with the practical problems that may arise in connection with relocated witnesses, such as child custody disputes and crimes committed under their new identity.

63. These programmes are usually included in appropriate legislation, which also deals with the protection of confidential sources and the protection of accomplices. For example, in China, the identity of an individual who makes a report concerning a criminal violation is protected throughout the investigation, unless that individual consents to have his or her identity disclosed. Informants who cooperate with the police are also protected. In Germany, there is no specific legislation permitting the relocation of witnesses and a change in identity. German law does, however, provide various other means of protecting witnesses; for example, the police authorities may take security measures for the protection of a witness within the framework of their normal duties. There are no similar provisions for protecting criminal informants who do not agree to testify in court. Italy has recently enacted legislation specifically providing for the protection of witnesses. This legislation includes provisions for their relocation. The programme is administered through a special central protection service within the Department of Public Security of the Ministry of the Interior and through an office under the National Anti-Mafia Prosecutor (Procuratore Nazionale Antimafia). Informal measures also exist for the protection of informants by the police.

64. Although the United Kingdom does not have any legislation regarding the protection of witnesses, the police can provide for the protection, relocation and change of identity of witnesses who have given evidence in criminal trials and are known to be in danger. These measures are available to accomplices who testify against the defendant, but there are no provisions for the protection of informants. The United States operates a witness protection programme, established by legislation, whereby the relocation of witnesses and the creation of new identities are authorized. This programme, which is governed by detailed rules and procedures, authorizes the following services, in addition to simple guarding of the witness and family: (a) issuing documents to enable the witness to establish a new identity; (b) providing temporary housing for the witness; (c) providing for the transportation of the household furniture and other personal goods to a new location; (d) providing subsistence payments to the witness; (e) helping the witness to obtain employment; (f) providing other necessary services to enable the witness to become self-supporting. In addition to the formal witness protection programme, investigative agencies can also provide some assistance in relocation, for example in the form of cash payments. Finally, some informal procedures exist for the protection of informants who do not give evidence in court.

65. Witness assistance programmes have been key issues in the fight against organized crime in countries where the problem is widespread and the number of cooperative accomplices is consequently

very large. The quality of their contribution and of the evidence they make it possible for the authorities to collect depends also on the quality of protection (physical, psychological and economical) that is provided. Questions arise about the most suitable agency for administering these programmes. The dangers entailed in a close relationship between the police or the prosecutor and cooperative accomplices are being discussed in countries where these authorities are in charge of protecting cooperative accomplices and witnesses. An independent authority may be the best way to manage the matter.

66. Another programme in the fight against organized crime is that which compensates the victims of acts of organized crime (for example, extortion). Such programmes are designed to increase resistance to the infiltration of organized crime into the legitimate economy, which sometimes starts as extortion, and to increase the cooperation of citizens who have been subjected to this kind of pressure.

D. Law enforcement methods and organization

67. If effective action is to be taken against organized crime, the law enforcement authorities must be able to collect and analyse systematically all relevant information from all appropriate sources in order to produce and use intelligence for both strategic and tactical purposes. The methods employed for the collection and use of such information should be authorized and controlled by legislation. Even so, it is important that the technical facilities and techniques that law enforcement authorities are allowed to use should always be sophisticated enough to enable them to match those employed by organized crime.

68. The production of intelligence requires the collection, processing and analysis of a wide range of information on the persons and organizations suspected of being involved in organized criminal activity, even including information that at first sight is not directly related to organized crime. There may be no rigid borderline between strategic and tactical intelligence, but the main aim of tactical intelligence is to help in the planning of particular law enforcement operations and to identify the sources for obtaining the evidence that will make it possible to arrest a suspect and to prove guilt. Analysis by trained personnel greatly increases the effective application of law enforcement intelligence. It is important to note that there is often a need to continue the collection of information throughout all the relevant stages of the legal process. Intelligence should always be collected in such a manner that even years later it can be retrieved and used as evidence.

69. Where resources permit, computerized information systems can be of particular benefit in combating organized crime.[17] Computers are used to store information on the various persons and organizations suspected of being involved in organized crime, as well as information about crimes already committed or being planned. Where there are different law enforcement agencies collecting information, appropriate arrangements need to be made to permit a regular exchange of information between local and national (or federal) authorities, and between local police forces in different areas. Careful attention must be paid to the compatibility of computerized systems, and the convertibility of manual systems to computerized ones. The creation of a centralized data bank may be appropriate in some countries, the information being shared internationally on the basis of mutual agreements. Furthermore, technical assistance in setting up and organizing criminal intelligence systems is advantageous to both developing and developed countries.

70. Particular attention has to be paid to information from confidential police sources, including prisoners. Important intelligence comes from other sources as well, however, and in particular from financial and taxation bodies. When permitted to do so, they can be of great assistance, as they frequently find themselves directly in contact with organized groups seeking to make use of the proceeds of crime. Legislative inquiries and official and public records may also be of value. An essential resource in the effective investigation of organized crime is the capability to collect, and present in an

intelligible manner as evidence, complicated financial and commercial information. The collection of information concerning forfeitable assets permits the forfeiture of such property and makes it available for State use.

71. The infiltration of organized crime into legal enterprises and any contacts it may make in political circles can create a superficial respectability, facilitate corruption and be used by criminals to hinder investigations of their activities. Therefore, law enforcement agencies, when collecting data on the criminal activity of a particular person or organization, need to obtain the most comprehensive intelligence picture possible. A range of measures have been adopted. These include measures: (a) to develop intelligence, through informants, searches and other techniques, in order to uncover large-scale organized criminal enterprises; (b) to determine the factors and conditions facilitating the development of organized criminal activity; (c) to provide for the centralized collection, storage and analysis of information (including the use of criminal organization charts) and for the tactical application of such information; (d) to ensure cooperation with law enforcement authorities and other bodies involved, using a multi-agency approach; (e) to study other countries' experience of organized crime control; and (g) to develop on the basis of the above factors a systemic approach to criminal policy, based on appropriate legislation, proper allocation of resources and mobilization of public support.

72. To lift the veil of secrecy, conspiracy and fear-induced silence of possible witnesses, as well as to understand how the criminal groups function, who directs their activities and where their illegal income is channelled, police bodies generally collect intelligence and evidence by using undercover methods. With appropriate safeguards, secret operations directed against organized crime can be conducted effectively through the use of undercover agents and informants, often in conjunction with the use of technical facilities to intercept and to record conversations, the contents of which may facilitate the disclosure of crimes. These techniques may include wire-taps, surveillance by means of closed circuit systems, night vision equipment, and video and audio recording of ongoing events. In some jurisdictions, such technical surveillance may be used only in cases when other mechanisms of investigation have failed, or there is no reason to think that they will lead to the desired results, or where other mechanisms are too dangerous.

73. If extreme care is exercised with regard to the reliability of accomplices or their testimony, and due account is taken of the severity of their offence, the cooperating witnesses for the prosecution may be a valuable means of infiltrating organized crime groups. Mitigation of sentence or even dismissal of charges, where possible, can motivate lesser criminals to assist in investigations of organized crime. The incorporation of such procedures into national legislation or recognized practice, together with the protective services previously discussed, has served to attract such cooperating witnesses.

74. The ways in which law enforcement agencies operate are related to three basic issues: (a) the management of intelligence; (b) the strategies for targeting the objectives; and (c) the techniques for gathering intelligence and evidence.

75. With reference to the management of intelligence, countries have different forms of organization, depending also on their political structure. In Germany, for example, each individual state in the Federation has a structurally similar command post, which collects and coordinates intelligence information related to organized crime. These individual offices are linked together with the Federal Criminal Investigation Department headquarters. In Italy, intelligence is collected by the three major police forces in Italy, which are the State Police, the Carabinieri and the Customs Police and by the new Anti-Mafia Investigative Board (Direzione Investigativa Antimafia) expressly created for intelligence gathering and operations against organized crime. Each of these police forces has a local office to investigate criminal acts. The intelligence gathered by these organizations is stored in a data-processing

centre within the Office of Police Coordination and Planning of the Ministry of the Interior. The data-processing centre runs the collection, classification, storage, and dissemination of the intelligence that has been collected and submitted by the investigative agencies.

76. The Jamaican police force has an organized crime unit whose function is to collect and analyse intelligence information related to organized crime activities. This information is gathered from a variety of sources, including contacts the police force has with investigative agencies in other countries. The information is analysed to identify the subjects who are engaged in criminal activities. In the United Kingdom, criminal intelligence gathering is conducted, processed and analysed by the National Drug Intelligence Unit, nine regional criminal intelligence offices, and the Metropolitan Police. A recent development is the creation of a national criminal intelligence service.

77. In the United States, the Federal Bureau of Investigation (FBI) is the primary investigative agency responsible for investigating organized crime activities. In addition, other investigative agencies, such as the Drug Enforcement Administration, the Internal Revenue Service, the United States Customs Service, the Immigration and Naturalization Service, and other federal, state and local investigative agencies, play an important part in attacking the problem of organized crime. The intelligence information gathered by these organizations is used in formulating a national organized crime strategy, which is developed from a variety of sources.

78. With reference to targeting strategies, in Brazil, for example, individuals are targeted for investigation mainly as a reaction to information received by the police. In China, in order to prevent the spread of organized crime, industrial companies, schools and street organizations closely monitor possible criminal elements and educate them to prevent them from falling into criminal ways. In Germany, the coordination of investigations is undertaken by the Federal Criminal Intelligence Division (BKA) headquarters, which informs the Public Prosecutors's Investigative office of its findings if that investigation reveals concrete suspicion of criminal activity. The BKA is charged with acquiring information relating to the fundamental structures of organized crime for use in determining proper investigative strategies with respect to those organizations. In Italy, the data base in the Ministry of the Interior is used to develop investigative strategies. The directors of the investigative agencies at the local and central level are responsible for the implementation of the investigative strategies developed through the analysis of the information contained in the data base. In Jamaica, decisions to target individuals or groups are usually based both on reaction to information received and on intelligence reports arising out of proactive plans.

79. In the United Kingdom, targeting strategies are determined at the senior level by using the intelligence collected through the process described in paragraph 76 above. Targeting may be a reaction to information received, but more probably entails a detailed evaluation of intelligence gathered and the preparation of a proactive investigative plan by the police force and intelligence officers for the relevant force or agency to implement. Prior to any targeting, the operational plan ensures that all information is researched, as far as is practically possible. The United States uses long-term sustained investigations and resulting prosecutions to attack the prominent organized crime groups which pose a significant threat to the country. This is a proactive as opposed to a reactive approach and is based on intelligence-gathering efforts identifying major criminal conspiracies.

80. With reference to intelligence and evidence gathering, many countries use a wide range of techniques, such as searches, informants, financial investigations and physical surveillance; electronic surveillance of telephone conversations and other types of telecommunication; undercover operations; debriefing of convicted persons; open sources, for example, public records, the media and articles in the press; liaison officers; embassies and missions abroad; foreign law enforcement intelligence agents; and

fortuitous discoveries made during routine investigations. Patterns for collecting and analysing strategic intelligence have been developed in many countries. An important example is the FBI "enterprise theory", whereby the organized crime enterprise itself becomes the focus of the investigation. While individual criminal acts are investigated, the investigation seeks to link the acts to an overall portrait of the organization's criminal activity and in this manner attack the entire criminal organization as opposed to isolated criminal acts committed by members of that organization. The RICO statute is a critical tool in the successful investigation and prosecution of criminal organizations.

E. Problems of coordination

81. Organized crime may be investigated by a variety of law enforcement agencies with different jurisdictions. It is essential to ensure that close coordination is maintained between central and peripheral structures as well as effective liaison between intelligence and operations. In countries with federal structures, it is also essential that effective mechanisms be established to ensure coordination of jurisdiction, intelligence and operations among federal policing agencies and those of other governmental units. While coordination within and between agencies and units is a condition for successful action against organized crime, a clear delineation of jurisdiction contributes to a harmonious and effective working relationship.

82. When resources permit, the formation of one or more specialized units dedicated to the investigation of organized crime could be very useful, particularly in the areas of corruption and money-laundering. The danger must be recognized, however, that exclusive jurisdiction over an area of investigation may create susceptibility to corruption, and appropriate safeguards should be developed.

83. Within any individual law enforcement agency, a strictly centralized senior management system, which can scrutinize all aspects of investigations and monitor their course, is necessary to ensure that all investigations are conducted in accordance with national laws and with a proper respect for individual freedoms. It is important for senior management officials to take into account the necessity of ensuring financial, logistical and moral support.

84. Investigators, and in particular those leading the investigation, should be selected on the basis of their ability, experience, moral qualities and dedication. The importance of basic and in-service training, not only for the police but also for prosecutors and judges, should not be underestimated. Two keys to success are specialization and a high degree of professionalism.

85. The relationships between investigative functions and prosecutorial and judicial organs vary markedly from one legal system to another and in any system, smooth coordination among them is an essential condition for effectively combating organized crime. Obviously, due respect must be paid to maintaining the proper relationships between the functions, keeping in mind the importance of preserving the independence and impartiality of the judiciary, as well as the proper role of defence lawyers.[18]

86. Regarding specific patterns of coordination, in Germany, for example, there are special offices within the BKA and in the criminal investigation divisions in the various states. These organizations are responsible for conducting investigations that have a regional impact. When coordination is required at a level above that of the region, this task is undertaken by the Organized Crime Commission, which is composed of the heads of the BKA and the criminal investigation divisions for the individual states. In Italy, in addition to the three police forces, there is a new one devoted to the fight against organized crime and another devoted to the fight against drug trafficking: The State Police, the Carabinieri, the Customs Police, the Anti-Mafia Investigative Board and the Central Anti-Drug Board (Direzione Centrale Antidroga). Each of these police forces has its own local offices to investigate criminal acts,

and also dispose of special units to investigate organized crime and drug trafficking. These investigative agencies have numerous regional and interprovincial offices to address crime problems that cross local and provincial boundaries. At the national level, these police forces operate through their own appropriate offices and regularly coordinate their activities. For example, intelligence information is coordinated by use of the data base which is jointly operated and is located at the Data-Processing Centre of the Interior Ministry. Special anti-Mafia district attorneys (Procure Distrettuali Antimafia) and a national anti-Mafia prosecutor (see paragraph 63 above) have recently been established. Their role is to coordinate the investigation and prosecution of organized crime cases.

87. In Jamaica, the police department has an organized crime unit, headed by a superintendent of police, who is accountable to the Deputy Commissioner of Police. This unit conducts undercover operations and is specifically charged with the responsibility of investigating various posses and gangs. In addition to the Organized Crime Unit, the following specialized agencies in the police department gather evidence with regard to organized crime prosecutions: Narcotics Division, Special Operations Division, Criminal Intelligence Division, Flying Squad, and the Monitoring and Analysis Division. The Organized Crime Unit, by use of regular conferences and meetings among the heads of the various agencies, coordinates the various activities under the Deputy Minister of Police. In the United Kingdom, there are no specialized units devoted to the prosecution of organized crime, in that traditional criminal organizations such as the Mafia do not at present have a large operational base in the United Kingdom. There are, however, nine regional crime squads located in England and Wales, which are composed of officers detailed from the 43 metropolitan police forces for three-year tours of duty. The responsibilities of these units are: (a) to identify and arrest those responsible for serious criminal offences which transcend the jurisdiction of individual police forces; (b) to cooperate with the regional criminal intelligence offices in gathering intelligence; (c) at the request of the chief of one of the 43 police forces, to assist in the investigation of serious crime. All operations conducted in relation to organized crime are recorded within the intelligence system and are cross-referenced to the individuals that are under investigation. Close liaison is maintained between the 43 municipal police forces and the regional crime squads. These organizations frequently conduct joint operations.

88. In the United States, the principal investigative agency responsible for organized crime investigations is the FBI, although many other investigative agencies make crucial contributions to this effort. In areas where the Cosa Nostra has a major presence, there are special units termed "strike force units", composed of experienced federal prosecutors dedicated to the investigation of organized crime cases. There is also a strategic reserve of prosecutors in Washington, D.C., who are available to develop organized crime cases in any particular area. In areas where there are large-scale drug activities, there are "drug task force" units devoted to prosecuting drug offences. In any event, the investigation and prosecution of organized crime at the policy level is coordinated by the Attorney General's Organized Crime Council, which is composed of the directors of the various investigative agencies and high ranking officials within the Justice Department.

89. With reference to the relationship between prosecutors and investigators, the situation varies according to the different structures of the criminal justice systems and law enforcement agencies. For example, in Brazil, the police are responsible for gathering evidence, which is later presented to the court for its decision. The prosecutor assists the court in developing the evidence during the trial of the case. Unlike some South American countries, there are no investigating magistrates in Brazil. In Italy, the new code of criminal procedure provides that the prosecutor bears the ultimate responsibility for investigating criminal activity. Owing to their high degree of complexity, organized crime cases may involve more than one public prosecutor. In that event, prosecutors are to share and exchange documents and other relevant information, as well as to coordinate with each other all instructions given

to the judicial police. The district anti-Mafia attorney's offices and the National Anti-Mafia Prosecutor are responsible for implementing this cooperation procedure.

90. In Jamaica, the Director of Public Prosecutions is in charge of all criminal proceedings on the island and works closely with the police in the investigation of organized crime. The magistrate's role is to adjudicate on matters presented to the court for trial and to issue, for example, warrants to ensure the satisfactory conclusion of the trial process. In Mexico, as previously noted, the Public Prosecutor is the official who bears the ultimate responsibility for both the investigation and prosecution of criminal offences. In performing such functions, assistance is provided by the Federal Police.

91. In the United Kingdom, the Crown Prosecuting Agency is an independent prosecuting agency, and is generally viewed as standing apart from the investigation of the crime and the operation of the police. The majority of the investigations are conducted without reference to the Crown Prosecution Service until such time as there is sufficient evidence available to institute criminal proceedings. An exception to this general principle is in cases involving serious fraud falling under the responsibility of the Serious Fraud Office. In the United States, the prosecutive and investigative agencies have forged a close working relationship when it comes to organized crime. For example, the law requires that all electronic surveillance must be applied for and supervised by a prosecutor, who then has the responsibility of reporting the status and progress of the surveillance to the court that authorized it. Coordination between the prosecutor and the investigative agency is maintained at all steps in an organized crime investigation, taking into account the distinct areas of responsibility, that is to say, the function of the investigator is primarily related to the pre-trial preparation of a case, while the primary responsibilities of the prosecutor are the charging decision and the trial of a case before a jury.

92. In any case, whether or not a separate unit is created to deal with organized crime, there should be accountability for responsibility and resources. If, for example, one police agency is assigned the primary responsibility for organized crime investigations, or if one or more agencies receive budgetary allocations to fight organized crime, the assignment of responsibility should be clear. In this way, at the end of the year or when controversies arise, the public and legislative oversight body could demand accountability from the responsible agency or body, regarding, for example, what accomplishments were achieved, how many persons were convicted and what assets were seized as a result of the budgetary resources or legal authority given to any particular agency.

CONCLUSIONS: TOWARDS AN INTEGRATED APPROACH

93. From the preceding analysis some brief conclusions may be drawn, which are also in line with the issues highlighted by the Commission on Crime Prevention and Criminal Justice at its third session.[19]

94. It will be recalled that the General Assembly, in its resolution 45/123, invited Member States to make available to the Secretary-General the provisions of their legislation relating to money-laundering and other measures to counter organized crime. Member States were requested, accordingly, by three notes verbales of 6 March 1991, 7 November 1991 and 9 July 1992, to provide to the Secretariat information on their legislative and other measures to combat organized crime and money-laundering. To date, 46 Member States have responded to this request. A survey of their replies demonstrates that, while certain countries have made considerable progress in establishing and implementing substantive and procedural legislation, law enforcement methods and other measures suitable to combat organized criminal activities, there are still a number of countries that lack any adequate legal provisions, and the judicial and investigative means and structures required to fight organized crime. In fact, most of the national legislative provisions reported to the Secretary-General pertain to drug related crimes, as a result

of the efforts of Member States to implement the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (E/CONF.82/15 and Corr.2). The rapid expansion of organized crime across borders, particularly at a time when efforts to liberalize trade and secure economic integration are being accentuated, makes the adoption and implementation of effective prevention and control measures essential. A lack of such measures at the national level, in addition to the threat that it poses to national economic development and security, will adversely affect international cooperation, to the detriment of efforts already under way and to the benefit of criminal organizations. The absence of legal and regulatory measures against organized transnational crime reflects the difficulties faced by a number of countries, particularly developing countries and those in transition, in coping with the problem.[20] It also demonstrates the urgent need for strengthened international cooperation and assistance to those countries, which, because of their particular situation or economic potential for the future, have become a primary target for transnational criminal organizations.

95. For action against organized crime to be effective, priority objectives must be determined and resources need to be efficiently managed. As it may realistically be impossible to fight all forms of crime with the same intensity in any particular society, a decision has to be taken on which of the most dangerous or serious ones should be pursued, taking into account the limited resources available. The difficulty lies in determining the criteria for such a selection. For example, is organized crime more dangerous than other forms of street crime or the so-called "victimless" crimes? The answers can be totally different, depending on the level of awareness and perception of the problem, which have a bearing on people's fear of crime; this, in turn, increases in proportion to the probability of experiencing that crime.[21] It is possible that in countries where organized crime does not strike the public as being as violent or as damaging as it does in other countries, it may not be regarded to as a top priority. Also, street crimes are closer than transnational organized crime to the day-to-day experience of the general public. Decision-makers, who are necessarily sensitive to public opinion and are also aware of the costs and the impact of these forms of crime on society at large, may be forced to take decisions that favour an immediate response to violent street crimes. The reality, however, is that there clearly exists a global-local nexus in relation to organized transnational crime.

96. In the area of substantial legislation, efforts against organized transnational crime would be considerably strengthened through the introduction of legislative reforms focused on:

(a) Criminalization of participation in a criminal organization;

(b) Criminalization of conspiracy or similar forms of inchoate offences;

(c) Prohibition of the laundering of criminal profits;

(d) Sanctions and other measures, such as the confiscation of goods and measures to prevent the preservation of illicit profits, aimed at defeating the economic power of criminal organizations.

97. As far as police action and criminal proceedings are concerned, strategic measures are required in the following areas:

(a) The improvement of intelligence in order to identify the organizational structure of criminal groups, types of activity of these groups, interrelations between the various groups and the means they use for self-perpetuation;

(b) The development of investigative methods that make it possible to "penetrate" criminal organizations, such as the creation of specialized investigative units, the interception of communications, the use of undercover operations and controlled deliveries, the protection of witnesses and victims, and the reward and protection of cooperative witnesses and accomplices;

(c) The development of investigative methods and other mechanisms aimed at seizing and freezing illicit profits and thus facilitating confiscation, for example the establishment of appropriate structures at the national level (integrated proceeds of crime units and seized property management directorates).

98. Strategic measures also include those addressed to the law enforcement agencies, in terms of enhanced capability, professionalism and coordination. Strategic intelligence should not be sacrificed to tactical intelligence. Investment in this area is essential, as is cooperation between different agencies. The concentration of energies and resources against organized crime in a specialized agency could be an innovative organizational measure only if this concentration truly happens. When this is not possible because of the notorious difficulties inherent in such a measure and the resistance to it, substantial and effective coordination among existing agencies and between the agencies and the prosecutors should be consistently pursued. Different patterns of cooperation and coordination can be found in the most experienced law enforcement agencies of many countries.

99. The growing threat to the economy posed by organized crime requires the progressive development of preventive strategies, mostly designed to preserve the stability of financial institutions and focused on:

(a) The provision of technical and forensic training for police, prosecutors and judges, enabling them to understand financial operations and collect evidence;

(b) The limitation of bank secrecy and other relevant regulations;

(c) A more active role for financial institutions in appropriate situations, for example in reporting suspicious transactions.

100. The criminal justice system on its own, overburdened and overloaded as it usually is, suffers from structural limitations in its ability to control organized crime. This situation calls for heavy investment in preventive strategies, which have probably been neglected in the past. The different systems to which these strategies are addressed therefore need to be increasingly integrated. The process, which began with the call for more cooperation between the banking system and the criminal justice system, should be extended to the educational system and to all areas of media communication. Commissions of inquiry and overviewing legislative committees could encourage such a process, which is a progressive one, involving a wide set of new policies and institutions traditionally outside the area of criminal justice. Administrative law and other forms of regulation of public contracts could reduce the probability of corruption and defend legitimate businesses from the infiltration attempts of organized crime groups. Together with the existing "hard laws", a new set of "soft laws" is necessary both domestically and internationally for achieving new standards of morality. The progressive elaboration of codes of conduct is a positive signal, as are other soft laws, such as the recommendations made by the Financial Action Task Force on Money-Laundering, set up by the Group of Seven major industrialized countries, which are influencing domestic policies.

101. The integration of strategies, policies and mechanisms, with effective and transparent management, is a challenging answer to the growing danger posed by transnational organized crime.

Notes

[1]Working paper on effective national and international action against: (a) organized crime; and (b) terrorist criminal activities, prepared by the secretariat of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (A/CONF.144/15); resolution No. 24 on the prevention and control of organized crime of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (see Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C); report of the Secretary-General on the strengthening of international cooperation in combating organized crime, submitted to the General Assembly at its forty-seventh session (A/47/381); account of the discussion on national and transnational crime, economic crime, including money-laundering, and the role of criminal law in the protection of the environment in the Commission on Crime Prevention and Criminal Justice at its second session, chap. II, sect. A; General Assembly resolutions 44/71, 45/123 and 47/87 on international cooperation in combating organized crime; Economic and Social Council resolution 1992/23 on organized crime and Economic and Social Council resolution 1994/12 on organized transnational crime.

[2]See E. U. Savona, "La réglementation du marché de la criminalité", Revue internationale de criminologie et de police technique, vol. XLV, No. 4 (1992).

[3]See R. J. MacCoun, J. P. Kahan, J. Gillespie and J. Rhee, "A content analysis of the drug legalization debate", Journal of Drug Issues, vol. 23, No. 4 (Fall 1993).

[4]See "Conclusions and recommendations of the meeting of the Ad Hoc Expert Group on Managing the Risk of Violence in a Criminal Justice System: a Framework of Analysis, held at Chicago, United States of America, from 18 to 20 August 1993" (E/CN.15/1994/4/Add.3, annex).

[5]See "Discussion guide on demonstration and research workshops to be held at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders", prepared for the Commission on Crime Prevention and Criminal Justice at its third session (A/CONF.169/PM.1/Add.1), chap. III, sect. B, paras. 40-51.

[6]New York State Organized Crime Task Force, Corruption and Racketeering in the N.Y. City Construction Industry (final report to Governor M. Cuomo, December 1989).

[7]E. U. Savona, op. cit., para. 6.2.

[8]See Joseph Serio, "Organized crime in the former Soviet Union: only the name is new", CJ International, vol. 9, No. 4 (July-August 1993), p. 11.

[9]See E. U. Savona and M. DeFeo, "Money trails: international money laundering trends and prevention/control policies", report prepared for the International Conference on Preventing and Controlling Money-Laundering and the Use of the Proceeds of Crime: a Global Approach, held at Courmayeur, Italy, from 18 to 20 June 1994, p. 97.

[10]Report and recommendations of the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: a Global Approach, held at Courmayeur, Italy, from 18 to 20 June 1994 (E/CONF.88/7, annex).

[11]See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.

[12]See Recommendations on Bribery in International Business Transactions, adopted by the Organisation for Economic Co-operation and Development on 27 May 1994.

[13]See resolution No. 1 on civil, administrative and criminal aspects of corruption, adopted by the Council of Europe 19th Conference of European Ministers of Justice, held at Valletta in 1994; see also "Extortion and bribery in international business transactions" in the report adopted by the Council of the International Chamber of Commerce at its 131st session on 27 November 1977.

[14]United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (E/CONF.82/15 and Corr.2), art. 5, para. 4.

[15]See E. U. Savona and M. DeFeo, op. cit., p. 97.

[16]See "Conclusions and recommendations of the meeting of the Ad Hoc Expert Group on Managing the Risk of Violence in a Criminal Justice System: a Framework of Analysis, held at Chicago, United States of America, from 18 to 20 August 1993" (E/CN.15/1994/4/Add.3, annex, sect. III).

[17]Guide to Computerization of Information Systems in Criminal Justice, Studies in Methods, Series F, No. 58 (United Nations publication, Sales No. E.92.XVII.6).

[18]Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (United Nations publication, Sales No. E.92.IV.1), Part One, sect. D.

[19]See Official Records of the Economic and Social Council, 1994, Supplement No. 11 (E/1994/31), chap. II, paras. 19-29 and Economic and Social Council resolution 1994/12 on "Organized Transnational Crime", annex.

[20]See the reports of the Asian and Pacific, European, Latin American and Caribbean, African, and Western Asia Preparatory Meetings for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (A/CONF.169/RPM.1/Rev.1, A/CONF.169/RPM.2, A/CONF.169/RPM.3, A/CONF.169/RPM.4 and A/CONF.169/RPM.5).

[21]A. Alvazzi del Frate, U. Zvekic and J.J.M. van Dijk, eds., Understanding Crime. Experiences of Crime and Crime Control, No. 49 (United Nations Interregional Crime and Justice Research Institute, Rome, 1993).